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No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

JEFFREY A. SISSON, PETITIONER

v.

J. LYNN HELMS, Administrator,
Federal Aviation Administration and
ROBERT FAITH, Alaska Regional
Administration, RESPONDENTS

Petition for Writ of Certiorari to
The United States Court of Appeals
For the Ninth Circuit

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QUESTIONS PRESENTED FOR REVIEW

1. Did the Ninth Cirucit Court of Appeals err in determining that the District Court found no positions to be available for which the petitioner was qualified in the field for which he had applied?

2. Did the Ninth Circuit err in failing to address the appropriate legal standard to be applied to the facts elicited during trial?

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STATUTES INVOLVED

(See Appendix [B]).

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Petitioner, JEFFREY A. SISSON, respectfully prays a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered on October 28, 1983.

OPINIONS BELOW

The opinion of the Circuit Court of Appeals for the Ninth Circuit is reported at Sisson v. Helms NO. 84-3522 and is printed in Apendix A-1 hereto, infra. The judgment of the District Court is printed in Apendix C-1 and C-2 hereto, infra. The Journal Entry of Judgment of The District Court is printed in Appendix C-3 hereto, infra.

JURISDICTION

The judgment of the Ninth Circuit Court of Appeals was entered onJanuary 8, 1985. A timely petition for rehearing was denied on February 4, 1985. (Appendix A-2 infra. The jurisdiction of the Supreme Court is invoked under 28 U.S. Code 1257 (3).

QUESTIONS PRESENTED

1. Did the Ninth Circuit Court of Appeals err in determining that the District Court

found no positions to be available for which the petitioner was qualified in the field for which he had applied?

2. Did the Ninth Circuit err in failing to address the appropriate legal standard to be applied to the facts elicited during trial?

STATUTES INVOLVED

(See appendix [B]).

STATEMENT OF THE CASE

This is a handicap discrimination action brought by the petitioner, Jeffery A. Sisson pursuant to 42 U.S.C. section 2000E-5, 42 U.S.C. 2000E-16 and the Rehabilitation Act of 1973, (29 U.S.C section 791, et seq.). The petitioner alleged that the United States Federal Aviation Administration (FAA) discriminated against the petitioner on the basis of his handicap in refusing to consider him for a job for which he had applied,

i.e., an electronics technician in the Airways Facilities Division of the FAA. The case was originally filed on July 24, 1981 with trial commencing on January 11, 1983 and ending on February 7, 1983. At the close of the trial the District Court entered on the record findings of fact to be incorporated in its decision which was to come at a later date. On October 26, 1983, the District Court entered its "Memorandum and Order" finding judgment in favor of the defendant on all claims, Appendix C-2.

At the conclusion of the trial in February the District Court made the specific finding that "the applicant (petitioner) was entitled to a fair chance for the position for which he sought employment and that in the period between July, 1979 and August, 1980 there were several opportunities within the duty level GS-3/4 for which he aspired" Ap-

pendix C-1 at page 5-903. The court further found that "he was entitled to be considered, at least referred to and interviewed by someone in the hiring authority within the Airways Facilities Division for which he sought employment" Appendix C-1 at page 5-904.

In the District Court's memorandum and order entered some eight months after the trial, the court incorporated its original findings of fact. The essence of the court's memorandum and order found that the petitioner was incapable of physically performing the tasks of an electronics technician and therefore, was not "otherwise qualified" as is required under the standards as set forth Prewitt v. U.S. Postal Service, 662 F.2d 929 (5th Cir. 1981) Appendix C-2 at page 9.

The appeal was taken to the Ninth Circuit on the basis that the court below did not properly apply the standard in Prewitt supra, to the facts presented at trial. Appendix C-2. The Ninth Circuit declined to address the issue as to whether the physical requirements were job related and if so, whether the government failed to prove that a reasonable accommodation to the petitioner's handicap was not possible, finding instead that there were no positions available at the time of the petitioner's application Appendix A at page 92.

This petition comes to the Supreme Court as a result of the inherent inconsistency between the findings of fact between the District Court's decision in October, 1983 and the rulings from the Ninth Circuit upholding the District Court's decision in

January and February 1985. As was previously stated the District Court specifically determined that at that time the plaintiff applied for a position with the Federal Aviation Administration in the Airways Facilities Division there were jobs available, supra at pages 5 & 6. The Ninth Circuit on the other hand made a specific finding that the District Court held there were no jobs available at the time of the plaintiff's application, supra at page 7. As a result of the Ninth Circuit Court's finding that no positions were available it declined to address the issue of the appropriate standard to be applied to the plaintiff's case. In arriving at this decision the Ninth Circuit disregarded the specific finding of fact made by the District Court in February, 1984 and declined to rehear the

argument when the petitioner so moved necessitating that the petitioner pray this court for relief.

REASONS FOR GRANTING THE WRIT

CERTIORARI SHOULD BE GRANTED TO RESOLVE THE INHERENT CONFLICT BETWEEN THE SPECIFIC FINDING OF FACT BY THE DISTRICT COURT AND THE WHOLLY INCONSISTANT AND OPPOSITE FINDING BY THE CIRCUIT COURT OF APPEALS.

At the outset it should be undisputed that in a civil case tried without a jury the trial judge may make oral findings from the bench. Movible Offshore Inc. v. M/V Wilken A. Falgout 471 F.2d 268 (CA5, 1973)

Likewise, Rule 52(a) Federal Rule Civil Procedure mandates the District Court to enter such findings on the record for appropriate review. De Medina v. Reinhardt 686 F.2d 997 (CA DC 1982)

In the instant case the District Court

made a direct and detailed factual finding for which the petitioner applied during the period of his application supra. The Circuit Court proceeded to disregard that specific finding and hold that there were no jobs available supra at page 7.

A de novo review may be made by the appellate court where, although the District Court failed to make findings of fact as required by Rule 52(a) Federal Rules Civil Procedure there are sufficient solid facts discernible from the record to enable it to render a decision. Canadian Transport Co. v. Irving Trust 548 F.2d 53 (CA9, 1977). The Canadian Transport case is the classic application of the de novo procedure. There the issue arose upon a motion for preliminary injunction supported by affidavits. The District Court in denying the injunction

made no findings of fact but the record was sufficient to allow the Appellate Court to independently make the necessary factual determinations Id. at 55.

In the case at bar the reverse situation occurred with the Appellate Court directly contradicting a specific finding made by the District Court. This the Court is precluded from doing unless it first determines that the findings by the trial court are completely devoid of minimum evidentiary support displaying some hue of credibility. Rochez Bros. Inc. v. Rhoades 527 F.2d 880 (CA3, 1975). No such determination was made by the Appellate Court and such is required prior to overturning a factual finding of the trial court Kelly v. Southern Pacific Company 419 US 318, 95 S.Ct 472 (1974). Indeed if the Appellate Court was faced with

apparent inconsistant findings from the trial court the appropriate action would be to remand the case for re-examination. Id. at 332. However the "Memorandum and Order" supplementing the original findings by the trial court was not inconsistant. At no time did the trial court find jobs to be unavailable appendix C-1, C-2. The basis for ruling adverse to the petitioner was founded upon the legal standard to be applied to the F.A.A., an issue briefed and argued to the Ninth Circuit but not ruled upon by that Court. The petitioner is thus left wholly in the dark as to the reasons for the decisions.

CONCLUSION

Wherefore, petitioner respectfully prays that a writ of certiorari be granted and the case be remanded to the Ninth Circuit for a determination of the appropriate legal standard to be applied.

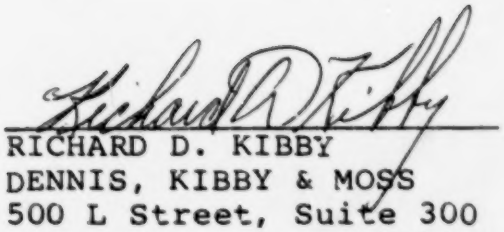
CERTIFICATE OF SERVICE - SERVICE BY MAIL.

I, Richard D. Kibby, a member of the Bar of the Supreme Court of the United States and counsel of record for Jeffery A. Sisson petitioner herein, hereby certify that on May 6, 1985, pursuant to Rule 33, Rules of the Supreme Court, I served three copies of the foregoing Petition For Writ of Certiorari on the party herein, as follows:

On Sue Ellen Tatter, respondent's attorney of record herein, by depositing such copies in the United States Post Office, addressed to the post office address of Sue Ellen Tatter, the above-named respondent's counsel of record, at 701 C Street, Anchorage, Alaska 99501.

All parties required to be served have been served.

Dated June 6, 1985



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